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SERVICE DATE - MARCH 13, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 766N)

CONRAIL ABANDONMENT OF THE WEEHAWKEN
BRANCH—IN HUDSON COUNTY, NJ

STB Docket No. AB-167 (Sub-No. 1067N)

CONRAIL ABANDONMENT OF THE RIVER
LINE—IN HUDSON COUNTY, NJ

Decided: March 12, 2001

Consolidated Rail Corporation (Conrail) filed two applications on November 14, 2000, under section 308 of the Regional Rail Reorganization Act of 1973 (3-R Act), 45 U.S.C. 748,¹ to abandon approximately 3.84 miles of the Weehawken Branch² and 6.95 miles of the River Line,³

¹ Section 308 was added by the Northeast Rail Service Act of 1981 (NERSA), enacted as Subtitle E of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35. NERSA established separate, expedited procedures for abandonments filed by Conrail. Section 308(b) applied to abandonment applications filed before December 1, 1981. Section 308(c) applied to abandonment applications filed after December 1, 1981, if prior to November 1, 1983, Conrail filed a Notice of Insufficient Revenue (NIR) for lines that were to be the subject of abandonment applications. The authority to file NIRs was subsequently extended from November 1, 1983, to November 1, 1985. Pub. L. No. 98-181, effective November 30, 1983.

² The 3.84-mile segment of the Weehawken Branch extends from the “point of switch in Jersey City[, NJ]” (approximately MP 0.00) “to the southerly R.O.W. line of Baldwin Avenue in Weehawken[, NJ]” (approximately MP 2.84), and includes “the former DL&W Railroad Lead to the Hoboken Freight Yard in Jersey City.” Conrail Application in STB Docket No. AB-167 (Sub-No. 1067N), at 2.

³ The 6.95-mile segment is composed of part of Conrail’s River Line: (1) from the connection to the Passaic and Harismus Branch at Controller Point (CP) “Waldo” in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard; and (2) from the south side of Clifton Road in Weehawken (approximately MP 0.00) to the northwest side of Tonnelle Avenue (excluding the portion of line, associated track, and underlying right-of-way necessary to retain access and continue service to Durkee Foods) in North Bergen, NJ (approximately MP 1.53); plus the National Docks
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in Hudson County, NJ.⁴ For convenience, the two lines will be referred to jointly as the River Line.

The abandonment applications are related to two petitions for exemption to discontinue operations on the River Line. The petitions were filed by Norfolk Southern Railway Company (NS) on November 14, 2000, in Norfolk Southern Railway Company–Discontinuance Exemption–in Hudson County, NJ, STB Docket No. AB-290 (Sub-No. 212X), and by CSX Transportation, Inc. (CSXT) on November 20, 2000, in CSX Transportation, Inc.–Discontinuance Exemption–in Hudson County, NJ, STB Docket No. AB-55 (Sub-No. 584X).⁵ As discussed in more detail later, using Conrail as their agent, NS and CSXT provide direct service to shippers on the line.

Cognis Corporation (Cognis), one of two active River Line shippers, filed replies to NS' and CSXT's petitions for exemption on December 28, 2000, and motions to dismiss Conrail's abandonment applications on January 12, 2001. The New Jersey Transit Corporation (NJT), an instrumentality of the State of New Jersey, filed letters in support of the proposed abandonments and petitions for exemption on December 28, 2000, and February 8, 2001. Dykes Lumber Company, Inc. (Dykes), the other active shipper, filed a letter supporting Cognis on January 18, 2001. Conrail, NS, and CSXT jointly filed replies to Cognis' replies on January 16, 2001,⁶ and

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Secondary in Jersey City from where it connects with the River Line at CP "Nave," to the east side of Newark Avenue (approximately 1,350 feet); and the Weehawken Branch (Chicken Yard) in Weehawken, from where it connects with the River Line on the east side of Willow Avenue to the end of the track (approximately 2,450 feet).

⁴ These proceedings are not consolidated. They are being considered together because the Weehawken Branch and the River Line are operated as a single line as a result of changes made to track alignment and operations.

⁵ Notice was served and published at 65 FR 76003 on December 5, 2000, in STB Docket No. AB-290 (Sub-No. 212X) and at 65 FR 77071 on December 8, 2000, in STB Docket No. AB-55 (Sub-No. 584X).

⁶ On January 25, 2001, Cognis filed a motion to strike the joint reply, contending that it violated 49 CFR 1104.13(c) and that Conrail had not sought, or been granted, leave to intervene. NS and CSXT filed a reply on February 6, 2001. In the interest of a more complete record, we will deny Cognis' motion to strike. In so doing, we note that Cognis served a copy of its reply on Conrail, and in it stated that "the proposed abandonments and petitions for discontinuance of service are all part of one interrelated transaction;" that the Board "should reject" Conrail's attempt to use section 308; and that it was reserving the right to file appropriate requests in the
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Conrail filed replies to Cognis' motions to dismiss on January 24, 2001. NS' and CSXT's petitions for exemption and Cognis' replies are the subject of a separate decision being issued today. In the instant proceeding, we are denying Cognis' motions to dismiss. In a separate decision issued in these proceedings on February 16, 2001, in response to offers of financial assistance (OFA) filed by Cognis, the Director of the Office of Proceedings postponed the issuance of decisions authorizing these abandonments pending the completion of the OFA process.

BACKGROUND

Under section 308(c) of the 3-R Act, Conrail was authorized to file NIRs for any line that was part of its system.⁷ Our predecessor, the Interstate Commerce Commission (ICC), was, and as its successor we are, required to grant applications to abandon lines designated by timely filed NIRs by the 90th day after the applications are filed unless OFAs under sections 308(c) and (d) are filed within the 90-day period.⁸ Conrail filed timely NIRs for these lines on October 31, 1983 and 1985, respectively.

A large part of the real estate and track of the River Line was transferred to NJT on or about October 24, 1995. Conrail retained the remaining real estate and track and a free and exclusive easement to operate and maintain the line.⁹ The transfer to NJT was made pursuant to a Freight Relocation and River Line Acquisition Agreement (River Line Agreement) that was entered into in 1985 and formalized in 1989. Under the River Line Agreement, NJT obtained the right to reconstruct and use the River Line for light rail commuter passenger service,¹⁰ and

⁶(...continued)
Conrail abandonments.

⁷ The NIR procedures guaranteed Conrail that it could abandon any line at any time, and, as a consequence, encouraged Conrail to continue operating lines that had potential.

⁸ The ICC routinely delayed the issuance of the decisions granting abandonment applications for about a week to make sure no OFAs had been timely filed. See Conrail Abandonments Under NERSA, 363 I.C.C. 472, 476 (1981) (Conrail Abandonments).

⁹ In Maine, DOT-Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), the ICC found that it lacked jurisdiction over the sale of a rail line to a noncarrier if the selling railroad retained an unqualified easement along with the common carrier obligation to operate the line. Conrail and NJT formalized their agreement prior to the State of Maine decision, but it appears that their agreement is consistent with that decision.

¹⁰ NJT seeks to use the right-of-way to construct and operate a portion of the Hudson Bergen Light Rail Transit System (HBLRT), which it describes as a key component in the
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Conrail agreed to seek authority to abandon freight service. If the abandonments are granted, the River Line is to be dedicated to passenger service and through freight services are to be transferred to Conrail's Northern Branch, which NJT is to reconstruct and upgrade. Conrail filed the instant abandonment applications because NJT is ready to begin reconstructing the River Line. Conrail states that it will continue to provide freight service over the River Line until the Northern Branch is reconstructed and ready for through service.

If the abandonments are denied, the agreement requires Conrail to construct safety-related facilities to permit simultaneous freight and passenger operations. Conrail claims that the proposed abandonments would save it the expense of constructing these costly facilities on a line that it no longer owns or needs and would eliminate the need to impose the operating restrictions necessary to accommodate joint passenger and freight services.¹¹

NS and CSXT state that they filed the exemption petitions because Conrail would not be able to consummate the abandonment of the River Line until their operating rights over the River Line are discontinued. They also request expedited action to permit the exemptions to become effective on February 12, 2001, the anticipated effective date of the Conrail abandonments. NS and CSXT state that they will not discontinue overhead operations until the Northern Branch has been reconstructed and that they will implement the exemptions to the same extent and at the same time that Conrail exercises abandonment authority.

NS and CSXT acquired joint control of Conrail in CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc., STB Finance Docket No. 33388 (Decision No. 89) (STB served July 23, 1998) (Conrail), clarified and modified (Decision No. 96) (STB served Oct. 19, 1998), petitions for review pending sub nom. Erie Niagara Rail Steering Committee v. STB, Nos. 98-4285 et al. (2d Cir. argued Feb. 5, 2001). As part of the control transaction, NS and CSXT acquired local and overhead operating rights in three "Shared Assets Areas" (SAA). These operating rights are governed by related Shared Assets Areas Operating Agreements (SAA Agreements) that were also approved in Conrail. The River Line is located in the North Jersey

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development of public transportation services in the densely populated northern New Jersey region. According to NJT, the capital projects in the River Line Agreement will increase the transportation options available to commuters, improve the movement of freight over other lines, and aid the environment by reducing air pollution and controlling traffic congestion.

¹¹ Conrail estimates that the necessary safety-related facilities would cost approximately \$1,865,000. NJT estimates that the design and construction costs could range "from \$1.8 million to over \$4 million depending on the joint use design and construction plan."

SAA, and its operation is governed by the North Jersey SAA Agreements.¹²

Under the SAA Agreements, NS and CSXT have exclusive and independent authority to establish rates, charges, service terms, routes, and divisions and to collect freight revenues on any traffic moving within the SAAs for their account. See Conrail, slip op. at 31. Pursuant to the Conrail transaction, Conrail has not been eliminated as a corporate entity; it generally owns and maintains the lines within the SAAs for the exclusive benefit of NS and CSXT and, as contemplated by the SAA Agreements, provides rail service to most customers within the SAAs as NS' and CSXT's agent. Neither NS nor CSXT has ever operated over the River Line, which is a branch line. NS and CSXT have used their local and overhead operating rights on main lines within the SAAs to reach rail yards, move overhead traffic, and directly pick up and deliver unit trains.

Cognis and Dykes will lose rail service if Conrail abandons, and NS and CSXT are relieved of their service obligations for, the River Line. Cognis argues that section 308 no longer applies to Conrail abandonments and that the NS and CSXT petitions fail to meet the exemption requirements of 49 U.S.C. 10502. Cognis contends that the proposed abandonments and discontinuances are closely intertwined and subject to 49 U.S.C. 10903. Cognis says that the entire transaction should be closely scrutinized under our abandonment regulations, 49 CFR 1152, and subjected to environmental review under 49 CFR 1105.¹³ Additionally, Cognis contends that NS' and CSXT's requests for expedition should not be granted to the extent that they would interfere with the OFA process.

DISCUSSION AND CONCLUSIONS

Cognis states that one of the key premises underlying the 3-R Act was that Conrail would become profitable and attractive for sale as a private corporation, that NERSA was enacted to amend the 3-R Act, and that the section 308 abandonment procedures were designed to reduce Conrail's operating costs by allowing Conrail to quickly abandon assets that were failing or were a drain on capital without having to comply with the more time consuming abandonment

¹² The other SAAs are referred to as the South Jersey/Philadelphia SAA and the Detroit SAA.

¹³ The notices in STB Docket No. AB-290 (Sub-No. 212X) and STB Docket No. AB-55 (Sub-No. 584X), see supra note 5, indicated that the carriers were not submitting information required by our environmental regulations at 49 CFR 1105 because NS and CSXT had never conducted operations over the River Line, but rather, Conrail has conducted operations on their behalf. They observed that grants of discontinuance authority are not likely to have environmental impacts if services have never been provided and concluded that the requirement for environmental reports and analyses would be superfluous. We address these observations in the decision considering NS' and CSXT's exemption petitions.

procedures of 49 U.S.C. 10903. Cognis argues that the section 308 procedures had a special legislative purpose relating to Conrail as it existed 20 years ago. The procedures, Cognis contends, cannot apply to the proposed abandonments because of the nature of the interest Conrail seeks to abandon and because of the recent change in Conrail's status.¹⁴

According to Cognis, the plain language of the statute and the clear legislative intent establish that section 308 was to apply only to the abandonment of lines of railroad. Cognis contends that the River Line is not a line of railroad at all but an easement to provide freight service and as such does not come under the scope of NERSA. Additionally, Cognis argues that NERSA never contemplated that its fast-track procedures would apply to easements that, as admitted by Conrail, impose no financial burden. In Cognis' view, NERSA ceased to apply to the River Line when the line was sold to NJT. Cognis states that Conrail and NJT reached an understanding as to the terms and conditions of the sale in 1985, contemporaneously with the filing of the NIRs, and that Conrail disposed of the assets in 1995. Cognis contends that the conveyance of the River Line's assets to NJT, in lieu of a NERSA-driven abandonment, must be viewed as the functional equivalent of an abandonment under section 308(c)(2). We disagree.

There is nothing in the language of the statute to support Cognis' contention that an easement cannot qualify for an abandonment under the streamlined procedures of section 308. Section 308(a) simply provides that Conrail may file "an application for a certificate of

¹⁴ Cognis also claims that NERSA is out of date and that its use is inappropriate. The shipper states that the section 308 abandonment procedures have not been used in the past decade and that the NIRs filed in these proceedings are 15 and 17 years old and are no longer relevant because they are based on revenue and cost figures that existed when Conrail owned, and was responsible for the cost of owning and maintaining, the River Line.

To the contrary, our records show that Conrail used the section 308 procedures as recently as 1993. See Conrail Abandonment of the Perryville Track in Cecil County, MD, Docket No. AB-167 (Sub-No. 1017N) (ICC served Jan. 8, 1993); Conrail Abandonment in Clearfield County, PA, Docket No. AB-167 (Sub-No. 1002N) (ICC served Mar. 1, 1993); and Consolidated Rail Corporation Conrail Abandonment in Philadelphia County, PA, Docket No. AB-167 (Sub-No. 1015N) (ICC served Sept. 24, 1993).

Additionally, we note that NIRs did not have to be based on specific revenue and cost figures, that no time limit was placed on the use of the section 308 procedures once an NIR was timely filed, and that NIRs are not reviewable in any event. See Conrail Abandonments, 365 I.C.C. at 473 ("Conrail solely determines the contents of the notice and what constitutes insufficient revenues."); and Minsi Rail Corp. v. United States, 638 F. Supp. 1346, 1351 (Spec. Ct. R.R.R.A. 1986) (Minsi) ("based on the statutory language and its legislative history, the Court determines that it was not the intent of Congress that it review Conrail's notices of insufficient revenues upon appeal from the ICC, or that the Court recognize a private right of action under section 308(c)" (footnote omitted)).

abandonment for any line which is part of the system.”¹⁵ The language applies to any Conrail interest that is subject to the abandonment requirements of 49 U.S.C. 10903. An easement is such an interest if, as here, it carries a common carrier obligation. The statutory language and legislative history simply did not limit the interests that could qualify for abandonment under the section 308 procedures. Thus, the ICC concluded in 1981 that “[i]n essence, section 308 requires us to grant, without examination, any Conrail abandonment application unless an offer of financial assistance is timely filed.” See Conrail Abandonments, 363 I.C.C. at 472 (emphasis added). Moreover, ICC precedent shows that Conrail made broad use of section 308 procedures to abandon lines regardless of whether it owned the underlying right-of-way¹⁶ or the line itself.¹⁷

Cognis’ argument that Conrail may not use the streamlined procedures of section 308 to abandon a line that is failing or a drain on resources simply because it does not physically own the line is also contrary to the legislative intent of NERSA. NERSA was intended “to stop Conrail from hemorrhaging federal funds and to make Conrail a profitable system.” See Minsi, 638 F. Supp. at 1350. In effect, Conrail was given “an unobstructed opportunity to become a solvent operation.” See Consolidated Rail Corp. v. County of Monroe, 558 F. Supp. 1387, 1389 (Spec. Ct. R.R.R.A. 1983), cert. denied, 462 U.S. 1120 (1983). Cognis ignores NERSA’s broad statutory mandate and the overriding importance of Conrail’s common carrier obligation.¹⁸ Although Conrail sold the track and right-of-way, it retained the obligation and the ability to provide common carrier service to the River Line’s shippers. The River Line remained part of Conrail’s system, and Conrail’s obligation to operate it would continue until such time as it was

¹⁵ Similarly, section 308(c)(1) provides that Conrail may file “a notice of insufficient revenues for any line which is part of the system.”

¹⁶ There were many instances where Conrail did not own a fee simple interest in the right-of-way that was the subject of a NERSA abandonment. See, e.g., Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 493N) (ICC served July 12, 1984) (“Conrail estimates that the line has a zero net liquidation value because it does not own the underlying right of way and the cost of dismantling the line would offset its salvage value”); Conrail Abandonment Between North Thatcher Glass and Sunman, IN, Docket No. AB-167 (Sub-No. 119N) et al. (ICC served May 21, 1982) slip op. at 10-11 (“we will discount the value to reflect the fact that Conrail only holds 66 percent of the land in fee”).

¹⁷ In at least one instance, Conrail did not own the line it sought to abandon under NERSA. See Conrail Abandonment in Luzerne County, PA, Docket No. AB-167 (Sub-No. 460N) (ICC served June 17, 1983) (“Conrail . . . claims that it does not own the line and did not assign an estimated value to the property.”).

¹⁸ Cognis also ignores that in all likelihood it was the asset sale and the NIR procedures that made it possible for Conrail to operate the River Line for the last 17 years.

granted abandonment authority. Thus, the sale of the River Line to NJT cannot be considered the functional equivalent of an abandonment.

Cognis argues that the Conrail that was aided with the streamlined procedures of section 308 no longer exists and has not existed for at least a decade. Cognis contends that the dire financial situation affecting Conrail in the 1970s and 1980s is long past, that Conrail fully recovered and sold its stock and assets to NS and CSXT in 1998, and that Conrail is jointly owned and controlled by those carriers. Thus, Cognis argues that Conrail is no longer an independent railroad and that there no longer is any need for Conrail to pursue expedited abandonments under NERSA.¹⁹

Cognis also claims that Conrail's use of the section 308 procedures would be contrary to the public interest. The shipper contends that the protections given to Conrail under NERSA have been superseded by Conrail's acquisition and the creation of the SAAs. Cognis argues that the termination of freight service on the River Line would eliminate some of the benefits that the Board relied on in approving the Conrail acquisition and the creation of the SAAs. Additionally, Cognis argues that the SAAs were carefully negotiated competitive components of the Conrail acquisition. The shipper contends that the SAAs would be undermined, and that our jurisdiction to scrutinize their operation over the 5-year oversight period would be eviscerated, if Conrail is permitted to use an expedited application to abandon the River Line.

In Consolidated Rail Corporation–Abandonment–Grampian Industrial Track in Clearfield County, PA, Docket No. AB-167 (Sub-No. 1005N) (ICC served June 8, 1988) (Grampian), Conrail's use of the NERSA abandonment procedures was contested following the passage of the Conrail Privatization Act, Pub. L. No. 99-509, in 1986. The contestants argued that the provision of that act, which explicitly preserved Conrail's NERSA abandonment rights for NIRs filed before November 1, 1985,²⁰ was contradictory; "that NERSA was not intended to give Conrail carte blanche to file a series of Notices of Insufficient Revenue, and have the special NERSA abandonment rights extended indefinitely;" and "that the expedited NERSA abandonment procedures should have terminated when Conrail became a private, investor owned entity." Grampian, slip op. at 6-7. The ICC rejected these arguments. The agency found that section 308(c) unambiguously provided that Conrail's NERSA abandonment rights were intended to extend indefinitely.

Cognis argues that the Grampian decision is no longer relevant because it concerned an

¹⁹ Cognis claims that the proposed abandonments are drastic and unnecessary in view of (1) Conrail's failure to allege that NS' and CSXT's switch charges and reimbursements are insufficient and (2) NS' and CSXT's agreement to guarantee all of Conrail's preexisting obligations.

²⁰ 45 U.S.C. 741(k)(19).

abandonment application that was filed less than 3 years after the related NIR; was decided 12 years ago and at a time when Conrail was an independent railroad; and did not involve an easement. We disagree. Congress expressly provided in the Conrail Privatization Act that Conrail's NERSA abandonment rights were to continue indefinitely, notwithstanding that Conrail had become financially viable and was to be privatized. Conrail was privatized and is now owned by NS and CSXT, as a result of our administrative action, but it remains an active rail carrier.²¹ As long as Conrail continues to provide rail services, the plain language of section 308 and the Conrail Privatization Act mandate that we grant any Conrail abandonment application filed under section 308 within 90 days after the application is filed, unless an OFA under section 308(c) and (d) is filed within the 90-day period.²²

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Cognis' motion to strike the joint reply filed by Conrail, NS, and CSXT is denied.
2. Cognis' motions to dismiss the abandonment applications filed in these proceedings are denied.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

²¹ Conrail, slip op. at 176 (ordering paragraph 15).

²² Although we have no discretion in this matter, we see little if any merit to Cognis' contention that the proposed abandonments will have a significant adverse effect on the benefits anticipated from, or the competitive balance negotiated in, Conrail or on our ability to scrutinize the operation of the SAAs.